No. 80-502

Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1980

ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY: DAVID R. GROETHE, MARILYN DAY, EVELYN GRIESSE, and MARILYN FUSFIELD,

Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON and JOHN SIMKO, JR., Members of the Board of Education and DR. JOHN W. HARRIS, Superintendent of Schools and their agents, employees and successors,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully submit this Brief in Opposition to the Petition for Certiorari previously filed on behalf of Roger R. Florey, Justin B. Florey, David R. Groethe, Marilyn Day, Evelyn Griesse, and Marilyn Fusfield. Pursuant to Rule 34.2, the following will not be included herein:

A list of parties to the proceeding;

Citations to the opinions and judgments in the court below;

A concise statement of the grounds upon which the jurisdiction of the Court is involved; and

The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves.

QUESTIONS PRESENTED FOR REVIEW

1. Whether school district rules which permit the use of educational materials containing some religious content, and which permit the observance of holidays which have a religious and a secular basis, violate the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether those rules, as applied, unconstitutionally favor and establish religion over non-religion, or one religion over others.

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STATEMENT OF THE CASE

Petitioners' statement of the decisions below, jurisdiction, and constitutional provisions and school district rules is sufficient. Respondents feel compelled, however, to restate the facts of the case, for the manner in which the policy and rules at issue[1/] were promulgated and the context in which they were adopted is crucial to the disposition of this petition.

In December of 1977, Justin Florey participated in a kindergarten Christmas

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1/The policy and rules in question are accurately reprinted in Appendix A of the District Court's memorandum opinion, and, in pertinent part, in the Petition for Certiorari, and will not be stated at length. See Florey v. Sioux Falls School District 49-5, 464 F.Supp. 911, 918-919 (D.S.D. 1979) (hereinafter cited as Florey).

program which his father, Roger Florey, felt had excessive religious content. At that time the Sioux Falls school district had no written policy on the subject. As a result of a complaint made by Mr. Florey, Dr. Harris, the superintendent of schools, recommended that a citizens' committee be formed to aid in the development of policy and rules concerning the relationship between religious beliefs and school functions. The membership of this committee included, among others, the school district's director of music, an attorney, Jewish, Catholic and Protestant clergy, and a member of the American Civil Liberties Union. Tr. 77-78.

The citizens' committee deliberated for several months, seeking to develop

guidelines to aid the school district in complying with constitutional mandates regarding the relationship between public schools and religion. Tr. 78. After study by the school board and full, public hearing, the policy and rules recommended by the committee were officially adopted. Tr. 79-80.

In anticipation of final approval, school district personnel had implemented the policy for Christmas programs held in 1978. Tr. 80-81. Program formats were forwarded by the teachers to the director of music for review of their compliance with the guidelines. In only two instances was further consultation with the music staff or building principal deemed desirable. Tr. 81. Far from revealing any conscious or unconscious attempt to

indoctrinate, the programs reflect a desire to select easily recognized, innovative, or entertaining materials. Tr. 82-84. The programs consisted primarily of secular holiday music. Also included were some traditional Christmas carols. Exhibit 2.

From the outset, school district personnel recognized the need to conduct programs in such a manner that the inclusion of music and material from a religious background or with religious elements would not result in programs promoting any religious belief or nonbelief. Tr. 57-58, 75, 85, 97. Despite Petitioners' assertions to the contrary, it was never the purpose or intent of the school district to authorize or promote a program with religious effect. Tr. 69-70, 82. The

actual purpose and intent of the guidelines is best set forth in the policy itself:

> It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged.

At the evidentiary hearing conducted on December 7, 1978, Petitioners' case-in-chief consisted primarily of the introduction of evidence concerning the impact certain components of school Christmas programs might have on three individuals. None of these individuals was a student or former student in the Sioux Falls schools, or a music educator; rather, all were members of the clergy, of various faiths. Tr. 14, 25 and 36. More significantly, the record does not even reflect that any of Petitioners' witnesses had ever

attended a program such as is at issue here, although one witness said he thought he would. Tr. 47. Each testified, however, that certain Christmas music would be a religious experience for him. Tr. 15, 29 and 37.

Pastor Oliver explained his determination that such music was religious on the basis of his faith, Tr. 16, the fact that a song in question appeared in his hymn book, Tr. 17, and, importantly, the broad scope of experiences which he would consider religious. Tr. 19. Pastor Oliver freely admitted that his interpretation was not based on any experience in the public schools, Tr. 20, and further conceded that music with religious elements is often performed in secular settings. Tr. 21-23.

Martin Brokenleg conveyed a substantially different reaction to music with religious elements, but this too was based upon very personal elements of his faith. Tr. 29. Reverend Brokenleg specifically recognized that both the purpose and effect of the music would depend upon the setting in which such songs are sung. Tr. 31.

Finally, Petitioners presented the testimony of Professor Thomas Johnson. Although stating that songs such as "Silent Night" could have a religious purpose for him or his children, Tr. 39, 40, Professor Johnson limited his remarks to the "content" of such songs, Tr. 38, 39, and conceded that his view of such music was based upon his personal religious convictions. Tr. 40. Professor Johnson also agreed that some

songs containing religious references have a place in American culture and should be studied in the public schools. Tr. 41. He would apparently require that all music to be performed in the public schools be screened for offensively religious content. Tr. 47.

In contrast to the evidence adduced by Petitioners, Respondents squarely confronted the issues of purpose, effect and entanglement. Respondents' witnesses consisted of the administrators charged with supervising the Christmas programs, Dr. Harris and Donald Peterson; a former student who had recently attended schools in the district, Susan McGowan; and a musicologist who had been a student in the district, Ray Loftesness.

Mr. Peterson, the school district's

music education director, is a music educator of substantial experience and training. Tr. 76-77. He testified that Christmas programs in the district are not presented as religious experiences, Tr. 82, 89, but rather to "present a program musically genuine in its content and for the musical values thereof." Tr. 85. It was his opinion that the music involved in the district's programs complied with, and was necessary to meet the mandates of proper music education, Tr. 85-86, without regard to religious or non-religious content. Tr. 86, 88-89. Dr. Harris indicated that this complied with the policy of the district as adopted. Tr. 97-98.

Ray Loftesness had attended the Sioux Falls public schools, majored in

music in college, devoted forty years to radio broadcasting of quality music, and worked in the field of professional music for six years. Tr. 100. He has been a choral director, public relations director, and advance manager for Fred Waring. He did a great deal of musical research for Mr. Waring, Tr. 102, and is recognized as a musicologist (one who studies the performance, background and manner of composition of musical selections). Tr. 103. Mr. Loftesness revealed that Christmas carols were, in fact, a form of folk music in their inception, and were originally felt to be too secular for use by churches. Tr. 104-105. While conceding that such music might contain religious meaning for some on a personal basis, Tr. 110, he explained that the genesis of such

music is rooted more in culture and tradition than in organized religion. Tr. 106.

The usual manner of presentation and content of Christmas and choral programs in the district was addressed by Susan Henkin McGowan, a former student, of Jewish heritage. Tr. 112. It was her testimony that Christmas choral programs were presented for their artistic, educational and entertainment values, and not as religious celebrations. Tr. 113-114. Directly addressing the question of the music's purpose and effect, Ms. McGowan stated that her performance of a musical selection with Christian elements stemmed from artistic involvement, and did not reflect religious belief or require any statement of faith. Tr. 113-114. She valued the

opportunity she was given to gain poise, presence and maturity from musical performances in the public school program. Tr. 115. To her, the place of performance and the context in which words were spoken or sung were significant factors in determining the impact of the music on performer and audience alike. Tr. 114-115, 117.

Petitioners have carefully culled certain portions of the programs presented pursuant to the guidelines, for inclusion in the Petition for Certiorari. We hasten to point out the distorted view this gives of the actual content of the programs. For instance, the Emerson School program contained, in addition to the materials noted by Petitioners, plays entitled "12 O'Clock in the Toy Shop", "The Magic of the

Sugar Plum Fairy", and "The Christmas Card Maker"; and songs such as "Winter Wonderland", "Deck The Halls With Boughs of Holly", and "Let It Snow". The "debate" Petitioners refer to at page 10 and 11 of their Petition is not a debate as to who played the most important role at Jesus' birth. Rather, it is a mock trial as to which of the "Christmas Symbol Family" is the most important, a debate whose participants include "Jolly Old St. Nicholas", holly, and Chanukah candles. In a like manner, Petitioners would have the court believe that "almost half" of the songs performed at Garfield Elementary School were Christmas hymns, when, in fact, no more than five of the fifteen songs performed could even be characterized as containing any religious reference. Exhibit 2.

SUMMARY OF ARGUMENT

The tripartite test for reviewing alleged violations of the Establishment Clause of the First Amendment is well established, but it is applied on a case-by-case basis. The record in this case reveals not only a failure by Petitioners to prove their allegations, but an affirmative proof by Respondents of compliance with relevant constitutional standards.

The purpose of the challenged rules is to permit the use of the broadest range of educational material, while aiding district personnel in avoiding First Amendment controversies. The history of their promulgation and their actual wording make this clear. Petitioners fail to show any reason for reversing the decisions which uphold

the rules and the purpose they serve.

In order to show that the primary effect of activities conducted pursuant to the rules was either to advance or inhibit religion, and thus establish facial unconstitutionality, Petitioners would have had to show aid given to an overwhelmingly sectarian institution, or activities whose purpose could not be other than religious. Failing that, Petitioners would have had to prove an impact on the religious sensitivities of participants in, or observers of, the challenged activities. None of these propositions are supported by adequate proof in this case.

The place, manner of use, and context of use of the challenged programs and materials all bear upon the effect which results. The only testimony

adduced from participants or actual observers shows no impact on religious belief.

Respondents urge that the "excessive entanglement" prong of the tripartite test is of tenuous applicability in this type of case. The schools of the Sioux Falls district do not possess the attributes which led to formulation of that portion of the constitutional standard. Absent such characteristics, Petitioners are left to complain of a function which district personnel continually carry out -- the monitoring of curriculum.

Finally, Petitioners' arguments, if accepted, would lead public schools to assume a position of hostility toward religion. Such a position is not mandated by the Establishment Clause, and

would constitute a violation of the wholesome neutrality affirmatively required by the First Amendment.

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review.

Petitioners urge that the lower courts which decided this case misconceived the difference between "teaching about" and "observing" religion. In fact, this critical distinction was exhaustively analyzed by both lower courts, resulting in decisions which give proper significance to that distinction. The Petitioners' misconception in this case is of the proof necessary to support the claimed violation of the First Amendment. Had the Petitioners been able to prove a violation of the tripartite standard, we have little

doubt the challenged rules would have been stricken. Such a violation was not proved, and the evidence will not improve with presentation to this Court.

Petitioners raise the specter of "widespread adoption" of the challenged rules. We respectfully urge that the use of court-approved guidelines in such an uncertain area by two school districts in the entire country hardly constitutes contagion. More likely, the developments noted by Petitioners represent the continuing efforts by local boards of education to deal with First Amendment issues at the local level. The decisions by the lower courts in this case show a proper awareness of the need to validate such efforts when relevant constitutional criteria have been met.

The district court and court of appeals fairly considered and exhaustively analyzed all of the arguments raised by Petitioners. The resulting decisions comport entirely with First Amendment standards derived from prior decisions of this court. For the reasons stated, certiorari review is not warranted.

B. The Court Below Properly Applied the Tripartite Test, Consistent with Prior Decisions of this Court.

Governmental activities which have a secular purpose, which do not have the primary effect of advancing or inhibiting religion, and which do not excessively entangle government with religion, comply with the provisions of the First Amendment. The terms are carefully chosen and must be carefully

applied, for it is not every conceivable purpose or effect which is at issue, but only the "primary" purpose or effect; nor is it any incidental entanglement which may invalidate governmental activity, but only excessive entanglement.

The rules at issue here were carefully prepared to aid school personnel in complying with a policy statement which accurately reflects those constitutional criteria:

> It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged.

On their face, and in their application, the policy and rules were intended to, and do aid school district personnel in maintaining the neutrality required of public bodies in religious matters.

1. Secular Purpose

Despite Petitioners' unsupported allegations to the contrary, the purpose of the challenged rules is to establish guidelines for use by school district personnel in complying with the dictates of the First Amendment. At the same time, the rules permit the use of the broadest range of materials to achieve valid educational goals as determined by professional educators.

Petitioners contend that the purpose of the rules is to permit celebration of the religious aspects of Christian holidays. An examination of the wording and history of the rules reveals the error of this position. While no purely religious holiday may be "observed", those religious holidays which also have a secular basis may be

"observed", in compliance with the other rules.

Without benefit of supporting evidence, Petitioners allege that the Respondents' true motive for promulgating the rules is other than as set forth in the policy statement. The courts have not readily accepted such claims, and a good faith statement of secular purpose is generally found to be sufficient to meet the first prong of the tripartite test. See Committee for Public Education and Religious Liberty v. Regan, ___ U.S. ___, ____, 100 S.Ct. 840, 847 (1980); Hunt v. McNair, 413 U.S. 734, 741 (1973).

The purpose of the rules, compliance with constitutional standards while permitting the use of the widest range of educational material, comports

entirely with the view first enunciated by Justice Jackson in McCollum v. Board of Education, 333 U.S. 203 (1948):

> I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, arthitecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. ... The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity - both Catholic and Protestant - and other faiths accepted by a large part of the world's peoples. 333 U.S. at 235-236. (Emphasis added).

Such use of materials which happen to have religious elements is much different than the use of prayer, scripture or symbolism in cases like Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); and Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978). In each of the cited cases, the manner in which the material in question was used made it clear that there could be no purpose other than a religious one.

2. Primary Effect[2/]

The Petitioners have, at pages 36

2/Petitioners raise, for the first time, at pages 33 and 34 of the Petition, some argument concerning equal treatment of various religions. Since this issue has not heretofore been raised, argued, briefed or decided, we will not address it here.

and 37 of the Petition, engaged in a fanciful semantic exercise in an attempt to avoid the clear statement of this prong of the tripartite test. This Court has consistently held that it is only activities whose "primary effect" advances or inhibits religion which are barred by the Establishment Clause. An incidental or de minimis impact upon religion will not invalidate the questioned activity. Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 747 (1976).

In order to assess the primary effect of the programs at issue here, the place, manner and context of performance must be considered. As Judge Adams, concurring in Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979) accurately observed:

> The actual wording of a school exercise, for example, may be far less important than its context and purpose. A textual analysis might well invalidate the pledge of allegiance, the singing of "America the Beautiful," or the performance of certain works from Handel or Bach by a school glee club. Yet, such activities have not been held to violate the establishment clause, even though they include references to a God or a Supreme Being, because they are undertaken for patriotic, cultural or other secular reasons, and neither have, nor are intended to have, a religious effect on those participating in or witnessing them. These exercises, in other words, are not "prayers" within the meaning of Engel or Schempp. 592 F.2d at 202, n. 7.

Separating the text of the materials from the place and manner of their use cannot give an accurate view of the primary effect of the materials.

In harmonizing the "parochiaid" cases with the "school prayer" cases, it becomes clear that one of two factors

must be established to support a finding that the "primary effect" test has been violated: either the aid involved must flow to an institution so overwhelmingly sectarian in its mission and activities that the likelihood of religious advancement is virtually inescapable or the activity itself must be of such obvious religious nature that religion is necessarily advanced.[3/] It cannot be seriously contended that the Sioux Falls public schools are sectarian in their mission or activities. Thus, the issue becomes one of characterizing the nature of the materials in the context of their use, based upon the evidence presented to the district court.

3/Hunt, supra, 413 U.S. at 743; Schempp, supra, 374 U.S. at 223-224.

Petitioners have repeatedly sought to base that characterization upon their own self-serving conclusions, although those conclusions find no evidentiary support in the record. Absent such support, Petitioners must fail, and have failed in each of the courts below, for the burden of proof rests with them. Hunt v. McNair, 413 U.S. 734, 746 n. 8 (1973); Board of Education v. Allen, 392 U.S. 236, 243, 245, 248 (1968).

Petitioners claim that the three ministers who testified on their behalf, stated that "for their children, the school's observances were undistinguishable from church services." Review of the record will reveal that these witnesses testified as to the impact certain materials would have on them,

as ministers, but Petitioners introduced no testimony from students or former students. The impact on those clergymen has little, if any, relevance on the question of primary effect. Gaines v. Anderson, 421 F.Supp. 337, 342, n.6 (D. Mass. 1976).

3. Excessive Entanglement

Respondents do not contend that the third prong of the tripartite standard, whether the activity in question excessively entangles government with religion, does not apply to cases of this type. We do maintain, however that its application is difficult because of the sources from which it is derived, the so-called "parochiaid" cases.

The most significant factor in the formulation of the excessive entanglement

test, via the "parochiaid" cases, was the character of the institution benefiting from the challenged program. In Committee for Public Education and Religious Liberty v. Regan, ___ U.S. ___, 100 S.Ct. 840 (1980), this Court recently characterized the basis for its earlier decision in Meek v. Pittenger, 421 U.S. 349 (1975) as follows:

> The Court ruled that in "religion-pervasive" institutions, secular and religious education are so "inextricably intertwined" that "[s]ubstantial aid to the educational function of such schools ... necessarily results in aid for the sectarian school enterprise as a whole" and hence amounts to a forbidden establishment of religion. ___ U.S. at ___, 100 S.Ct. at 846.

This recognition comports with the rationale of the first case to enunciate the excessive entanglement test, Lemon v. Kurtzman, 403 U.S. 602 (1971), wherein

Chief Justice Burger carefully delineated no less than seven factors which led to the conclusion that aid given to sectarian schools, even though the aid itself was secular in nature, must necessarily advance religion. See Lemon, supra, 403 U.S. at 615, 617. None of those factors apply to the public schools in Sioux Falls, South Dakota.

Petitioners suggest that the enforcement of the rule and policy will constitute entanglement per se. This argument ignores the fact that the professional personnel of the district normally conduct a continuing review of curricular materials to delete outdated, irrelevant, obscene or unconstitutional materials. As was noted in Board of Education v. Allen, 392 U.S. 236 (1968):

> Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. 392 U.S. at 245.

A holiday program, like any program, can and should be reviewed to insure its compliance with educational policy and constitutional mandates. The same applies to books, movies, or any other learning aid. Justice Jackson's warning against requiring the courts to sit as a "super board of education"[4/] is nowhere more apt.

4/McCollum, supra, 333 U.S. at 237.

C. The Petitioners Failed to Submit Proof of a First Amendment Violation.

The Petitioners urge that the rules are unconstitutional as applied, and complain that both lower courts failed to resolve that question. Even a cursory review of the record discloses that it would have been a very difficult issue to resolve based on the meager evidence produced by Petitioners. Petitioners gratuitously characterize the programs as "pervasively religious", freely insert their own opinions of literary merit in lieu of the testimony of professionals, and conclude that it is "inconceivable" that a creche might be used for secular instruction during a two or three day period. None of these arguments were even addressed by Petitioners' witnesses and the record

provides no other support for them.

In terms of proof, one of the most critical aspects of any Establishment Clause case is the primary effect test, for it must be proven that the primary effect upon those who participate in or witness the challenged activity is to advance or inhibit religion. See Board of Education v. Allen, 392 U.S. 236, 248 (1968). This burden rested with Petitioners because there exists "a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society." Palmer v. Board of Education of the City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979)

Petitioners presented no testimony from any person who described the effect of the challenged programs on him or his

children. Rather, they have relied upon the testimony of three ministers whose religious background led them to conclude that some of the songs used were tantamount to prayer. Such testimony is not binding upon the school district or any court,[5/] and was directly refuted by a former student of the district who participated in such programs. Tr. 114-115, 117.

Petitioners have set forth selected parts of plays or songs constituting a portion of some programs which were presented. They ignore, however, the fact that 239 of 279 songs utilized were completely secular in nature. Further, they presented absolutely no testimony

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5/Gaines v. Anderson, 421 F.Supp. 337, 342 n. 6 (D. Mass. 1976).

to the effect that an observer of, or participant in one of these programs felt that religion had been advanced or inhibited. Although Petitioners claim that the "self-serving protestations of good intentions" contained in the general policy statement do not rebut the allegation of impermissible purpose, the record reflects a bona fide effort to provide district personnel with a tool to insure total compliance with the First Amendment. There is a complete failure of proof on the Petitioners' part.

D. The School District's Policy and Rules Comply with the Doctrine of Accommodating Neutrality.

At least since Zorach v. Clauson, 343 U.S. 306 (1952), this Court has noted the corrolary requirement of the First Amendment, that the state not be hostile

toward established religions. As Justice Douglas stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with the religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and

> sectarian education or use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. 343 U.S. at 313-314.

The cases are uniform in eschewing any intent or obligation to create hostility to religion.[6/]

It is the very nature of our society that religious considerations will make their presence felt in the schools.

6/See Everson v. Board of Education, 330 U.S. 1, 18, (1947); McCollum, supra, 333 U.S. at 211-212, Engel, supra, 370 U.S. at 433-434; Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968); Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668-670 (1970); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

As this Court noted in Roemer v. Board of Public Works of Maryland:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. 426 U.S. at 745-746.

It is clear that Petitioners seek this unattainable, hermetic separation. To reach such a point, however, the school district would be forced to exhibit a hostility toward organized religion which is not required by the First Amendment.

The rules comply with the key

features of accommodating neutrality. They recognize the necessary exposure of students in our society to elements of various religions; they allow the use of materials with religious elements to achieve valid educational goals; and they provide guidelines for the use of district personnel in making an objective evaluation of their programs. Thus, both aspects of accommodating neutrality -- the prohibition against hostility to religion, and the proper use of materials with religious elements to achieve secular educational goals -- are preserved.

CONCLUSION

Both the trial court and the Eighth Circuit Court of Appeals, after careful deliberation, correctly decided the

issues before them. The petition for a writ of certiorari to review those judgments should be denied.

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